No. 89-386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Petitioner,

– against –

PATRICK FEENEY,
Respondent.

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Petitioner,

– against –

CHARLES T. FOSTER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF PETITIONER PORT AUTHORITY TRANS-HUDSON CORPORATION

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QUESTIONS PRESENTED

1. Is the Petitioner, Port Authority Trans-Hudson Corporation, a wholly-owned subsidiary of the Port Authority of New York and New Jersey, an agency of the States of New York and New Jersey, created by interstate compact to which Congress consented, prevented from interposing Eleventh Amendment immunity from suit in federal court against a claim brought pursuant to the Federal Employer's Liability Act simply because such a judgment would not be paid out of general state tax revenues?

2. Does a reference to federal judicial districts in the Port Authority suability statute's general purpose venue provision waive Eleventh Amendment immunity in light of this Court's stringent standards for a finding of waiver?

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OPINIONS BELOW

The opinion of the Court of Appeals in *Patrick Feeney v. Port Authority Trans-Hudson Corporation* (Pet. App., A8 - A21) is reported at 873 F.2d 628. The opinion of the District Court (Pet. App., A27 - A44) is reported at 693 F.Supp. 34.

The opinion of the Court of Appeals in *Charles T. Foster v. Port Authority Trans-Hudson Corporation* (Pet. App., A24 - A25) is reported at 873 F.2d 633. The District Court's opinion (Pet. App., A46 - A50) is unreported.

JURISDICTION

The judgments of the Court of Appeals (Pet. App., A6 - A7; A22 - A23) were entered on April 26, 1989. The cases were consolidated by order of the Court of Appeals on May 9, 1989 (Pet. App., A3 - A5). A petition for rehearing was denied on June 6, 1989 (Pet. App., A1 - A2). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

Portions of the Compact and subsequently enacted bi-State legislation, N.Y. Unconsol. L. §§6401 *et seq.* (McKinney 1979); N.J.S.A. 32:1-1 *et seq.* (West 1963), relied upon by the Court of Appeals below, are reproduced in the Pet. App. at A51 - A55. Other portions of the Compact and subsequently enacted bi-State legislation, specifically relied upon herein, are reproduced in an Appendix to this Brief (A1 - A14).

STATEMENT

The Port Authority of New York and New Jersey is a direct agency of the States of New York and New Jersey created by an interstate Compact to which Congress consented (Ch. 154, Laws of N.Y., 1921; Ch. 151, Laws of N.J., 1921; 42 U.S. Stat. 174 (1921)). The Port Authority, pursuant to the 1921 Compact and subsequently enacted bi-State legislation, operates various terminal, transportation, and other facilities of commerce in the statutorily defined Port District, including through its wholly-owned subsidiary, the Petitioner Port Authority Trans-Hudson Corporation, the PATH interstate railway system. N.Y. Unconsol. L. §§6601 *et seq.* (McKinney 1979); N.J.S.A. 32:1-35.50 *et seq.* (West 1963).

The respondents in these consolidated cases are employees of PATH, and each had sought damages pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. §§51 *et seq.* (1982) (Pet. App., A10, A28, A47). In each case, PATH moved pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings upon the ground that PATH enjoys Eleventh Amendment immunity from suit on FELA claims in federal court. (*Id.*) The district court in each case granted PATH's motion (Pet. App., A44, A49).

The district court in *Feeney* held that under the reasoning of the Third Circuit in *Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey*, 819 F.2d 413 (3d Cir. 1987), *cert. denied*, ____ U.S. ____; 108 S.Ct. 344 (1987), the Port Authority was an arm of the States entitled to Eleventh Amendment immunity under the test laid down by this Court for determining such immunity — a finding which the district court found was fully applicable to PATH as the Port Authority's wholly-owned subsidiary (Pet. App., A43). In *Foster*, the district court reached only the issue of waiver since

PATH's status as a State agency had not been contested. (Pet. App., A47).

On the issue of waiver, both district courts carefully examined the Port Authority's and, thus, PATH's, suability statute and concluded that the statute contained neither an express, nor an implied, waiver of Eleventh Amendment immunity. Indeed, the district court in *Foster*, after examining the legislative history of the suability statute contained in the New York Legislative Annual, specifically held that the question of Eleventh Amendment immunity "was not addressed." (Pet. App., A49).

The Court of Appeals for the Second Circuit reversed both district courts, finding that PATH was not entitled to interpose Eleventh Amendment immunity, and remanded for further proceedings (Pet. App., A10, A18). The Court of Appeals held that the Port Authority and, by extension PATH, was not intended to be an agency for Eleventh Amendment purposes, although it acknowledged that the issue was, in its words, "close" (Pet. App., A16). It also held that, in any event, the State Legislatures had both implicitly and explicitly waived Eleventh Amendment immunity in the Port Authority's suability statute (Pet. App., A16).

More specifically, the Second Circuit, in ruling that PATH was not a State agency for Eleventh Amendment purposes, based its decision mainly on its determination that a monetary "judgment against PATH would not be enforceable against either New York or New Jersey" (Pet. App., A14). It deemed this factor sufficient to outweigh the other indicators of State agency status that it named, to wit: the method of appointment of Port Authority Commissioners and the gubernatorial veto power over Port Authority actions (Pet. App., A15).

With regard to waiver, the Second Circuit held that the Legislatures of the States of New York and New Jersey had effected an "explicit waiver, *albeit* partial" (emphasis supplied) (Pet. App., A18) of Eleventh Amendment immunity by including a reference to federal judicial districts in the general purpose venue provision of the Port Authority's suability statute. It reasoned that otherwise the reference to federal judicial districts would be meaningless (*Id.*). The court also held that there had been an implicit waiver of immunity. It noted that the suability statute legislatively overruled, *inter alia*, the case of *Howell v. Port of New York Authority*, 34 F.Supp. 797 (D.N.J. 1940), which had held that the Port Authority was a State agency rather than a political subdivision, a "conclusion", the Second Circuit reasoned, "that would support immunity under the Eleventh Amendment . . . ." (Pet. App., A17).

A Petition for Rehearing with suggestion for Rehearing *en banc* in the now consolidated cases was denied on June 6, 1989 (Pet. App., A1 - A2). This Court granted PATH's Petition for a Writ of Certiorari on October 30, 1989.

SUMMARY OF ARGUMENT

A. This Court in *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), delineated a test for determining whether a bi-State agency, such as the Port Authority and by extension, its wholly-owned subsidiary, petitioner, PATH, is a State agency for Eleventh Amendment purposes or a political subdivision in the nature of a county or a municipality which, for apparently historical reasons, is not entitled to claim such immunity.

Applying and weighing all the *Lake Country Estates* factors, no one of which by itself is pre-eminent or controlling,

we submit that the Port Authority is entitled to State agency status for Eleventh Amendment purposes inasmuch as the Legislatures of both States have declared many times that, in effectuating their statutory directives and authorizations, the Port Authority performs governmental functions, and both the federal and state courts have, without exception, held that it is a direct agency of the Compacting States themselves, engaged, on their behalf, in fulfilling functions of State government.

Moreover, although state tax or other general state revenues strictly speaking would remain untouched by judgments against the Port Authority, this factor does not make the agency, which presently is a *source*, rather than a recipient, of revenues for the Compacting States, any less a State agency. Indeed, the New York and New Jersey Legislatures have reserved to themselves the power to direct the flow of Port Authority monies.

B. While the Second Circuit's decision purports to analyze the Port Authority's status pursuant to the *Lake Country Estates* factors, in fact, its determination that the Port Authority is not an agency for Eleventh Amendment purposes is based solely on just one factor, namely, its determination that the treasuries of New York and New Jersey would not be liable for a judgment against the Port Authority or PATH. It found this single factor enough to outweigh other indicia of State agency status.

We submit that in thus overemphasizing the so-called "state treasury" factor, the Second Circuit misconstrued this Court's opinion in *Lake Country Estates* and misapplied the test of *Ford Motor Company v. Department of Treasury of Indiana*, 323 U.S. 459 (1945). There, this Court's focus on the state treasury was for the purpose of

determining who was the real party in interest since State officials were named defendants.

Moreover, in unduly limiting the definition of "state treasury" to state tax or other general state revenues, the Second Circuit fundamentally misinterpreted Eleventh Amendment jurisprudence since the protection of public funds cannot be the sole purpose of Eleventh Amendment immunity.[1] If it were, municipalities, counties, and other political subdivisions should be entitled to the protection of the immunity to protect the public funds entrusted to their authority. But, as noted above, historically they are not.

Rather, the Eleventh Amendment finds not only its genesis but also its continued significance in the vindication of State sovereign prerogatives in the name of federalism. Consequently, the test developed in *Ford* to identify the proper party to a lawsuit should not be turned into a vehicle for federal court interference in State management of its own internal fiscal affairs.

C. Since the Port Authority, by virtue of the absence of a consent-to-suit provision in the 1921 Port Compact which created it and to which Congress consented, was originally formed as an entity totally immune from suit even in the courts of New York and New Jersey, the question of its Eleventh Amendment immunity in federal courts comes down to whether some thirty years later the two Legislatures waived this immunity when they adopted the Authority's suability statute.

---

[1] Indeed, state treasury funds are reachable, notwithstanding the Eleventh Amendment, under certain circumstances, to wit: an award of attorney fees in an appropriate case or where the funds are to be expended in obedience to an injunction mandating that State officials conform their conduct to the requirements of federal law.

The Second Circuit, although acknowledging the stringency of this Court's standards for finding that Eleventh Amendment immunity has been waived, nevertheless ruled that the Legislatures somehow both implicitly and explicitly did just that when they enacted the Authority's suability statute. We submit that in so holding the Second Circuit simply ignored the dictates of this Court.

More specifically, the Second Circuit concluded that the Legislatures implicitly waived Eleventh Amendment immunity. It referred to the legislative history of the suability statute where, included in a long list of cases which had held that the Port Authority shared the sovereign immunity of the States, appeared a citation to the United States District Court opinion in *Howell v. Port of New York Authority*, 34 F.Supp. 797 (D.N.J. 1940). *Howell* had held that the Port Authority was a State agency and not a municipal corporation. The Second Circuit reasoned that the Legislatures must have thereby intended to waive the Eleventh Amendment immunity characteristic of State agencies. We submit that the Second Circuit's analysis flies directly in the face of the well-settled principle, articulated by this Court time and time again, that States do not waive Eleventh Amendment immunity merely by waiving sovereign immunity in their own courts. Moreover, the Second Circuit's reliance on legislative history is misplaced since this Court has counseled over and over that waiver of immunity must be found in the text of the waiving legislation itself.

Finally, the Second Circuit's finding of an explicit waiver in the reference to federal judicial districts in the general purpose venue provision of the suability statute, which it conceded was "somewhat anomalous" in the Eleventh Amendment context, simply does not take heed of this Court's caveat that such waivers must be "unmistakable" and "clearly expressed".

POINT I

The Port Authority Of New York And New Jersey, As A Direct Agency Of Those States, Is Immune From Suit Under The Eleventh Amendment.[2]

In *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), this Court specifically

> ". . . granted certiorari to decide whether the Tahoe Regional Planning Agency, an entity created by Compact between California and Nevada, is entitled to the immunity that the Eleventh Amendment provides to the compacting States themselves." 440 U.S. at 393 (footnote omitted).

This Court's task was to determine whether in creating the Tahoe Regional Planning Agency (TRPA), California and Nevada had created a State agency or a political subdivision. Thus,

> "If an interstate compact discloses that the compacting States created an agency comparable to a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be construed to immunize such an entity." *Id.* at 401.

---

[2] This same immunity applies no less to Petitioner, PATH, the Port Authority's wholly-owned subsidiary. The Legislatures of the two States have expressly stated that:

> "Such subsidiary corporation . . . shall have all of the privileges, immunities, tax exemptions and other exemptions of the port authority and of the port authority's property, functions and activities". N.Y. Unconsol. L. §6812 (McKinney 1979); N.J.S.A. 32:1-35.61 (West 1963) (A5).

The legislation also provides that:

> "The directors of such subsidiary corporation shall be the same persons holding the offices of commissioners of the port authority." *Id.*

In evaluating the agency, this Court looked to several factors. It analyzed the language of the Compact to determine how the Compacting States themselves denominated and considered the agency. So too, it looked to the Compact's provisions with respect to how and by whom the agency's governing board was appointed, how the agency was funded, as well as the responsibility or lack thereof of the Compacting States' treasuries for the obligations of the agency. This Court took particular note of the fact that the function performed by the agency, land use planning, was "traditionally a function performed by local governments." *Id.* at 402.

This Court also searched for indicia of State control over the actions of the agency. Of great moment was the fact that there was no "veto at the State level" over the agency's authority to make rules within its own jurisdiction — a characteristic this Court found to be common to cities, towns, and counties as opposed to State agencies (*Id.*). Indeed, this Court was particularly impressed by the fact that the TRPA was so independent of State control that one of the Compacting States, California, had "resorted to litigation in an unsuccessful attempt to impose its will" on the agency. 440 U.S. at 402.

Therefore, with respect to TRPA this Court had no choice but to conclude that:

> ". . . nothing short of an absolute rule [that any agency created by interstate compact has Eleventh Amendment immunity] would allow TRPA to claim the sovereign immunity provided by the Constitution to Nevada and California." *Id.*

Significantly, however, this Court did not find that any one of these factors was pre-eminent, or, in and of itself, controlling upon the question of Eleventh Amendment immunity. *See*, Point II, *infra*.

In applying the *Lake Country Estates* factors to the Port Authority, no such "absolute rule" is required for a finding of immunity. We shall now show that the Port Authority is entitled to invoke Eleventh Amendment immunity as an arm of the States of New York and New Jersey. *See*, *Port Authority Police Benevolent Association, Inc. (PBA) v. Port Authority of New York and New Jersey*, 819 F.2d 413 (3d Cir. 1987), *cert. denied*, ____ U.S. ____; 108 S.Ct. 344 (1987).

A. The Port Authority was created to be a State agency, not a political subdivision in the nature of a county or a municipality.

The Port Authority of New York and New Jersey was created by a Congressionally-consented-to interstate Compact between the two States, 42 U.S. Stat. 174 (1921), consenting to Ch. 154, Laws of New York, 1921; Ch. 151, Laws of New Jersey, 1921. In creating the Port Authority, both States expressly provided that the Port Authority should have those responsibilities and duties which were concurred in by the Legislatures of both States. N.Y. Unconsol. L. §6408 (McKinney 1979); N.J.S.A. 32:1-8 (West 1963) (Pet. App., A52).

Significantly, whenever the issue has arisen, the courts of New York and New Jersey uniformly have held that the Port Authority is a direct agency of the two States performing governmental functions on behalf of State government.

The New Jersey Supreme Court has described the Port Authority as having been created by the two States as their joint agent, to wit:

> "In 1921 the Legislatures of New Jersey and New York authorized the execution of the port compact . . . establishing the Port of New York district and creating the Port of New York Authority as their joint agency." *Newark v. Essex County Board of Taxation*, 54 N.J. 171, 175; 254 A.2d 513, 515 (1969), *cert. denied*, 396 U.S. 987 (1969).

Along the same lines, in *Trippe v. Port of New York Authority*, 14 N.Y.2d 119, 122-23; 198 N.E.2d 585, 586 (1964), the New York Court of Appeals described the Port Authority as

> "a governmental agency of the States of New York and New Jersey"

and as

> "a direct agency"

of the two States.

A number of decisions recognizing the nature of the Port Authority as a State agency were collected in *Port of New York Authority v. J.E. Linde Paper Company*, 205 Misc. 110, 113-114; 127 N.Y.S.2d 155, 158-159 (N.Y. Mun. Ct. 1953), wherein the court in unequivocal terms declared that:

> "The Port Authority is an arm and agency of the States of New York and New Jersey, and in all of its activities, is engaged in the performance of essential governmental functions. (*Bush Term. Co. v. City of New York*, 152 Misc. 144, *aff'd*, 282 N.Y. 306; *Commissioner of Internal Revenue v. Shamberg*, 144 F.2d 998, *certiorari denied* 323 U.S. 792; *Graves v. New York ex rel. O'Keefe*,

> 306 U.S. 466, 484; *Helvering v. Gerhardt*, *supra*; *Gaynor v. Marohn*, 268 N.Y. 417, 424,425; *People ex rel Buffalo & Port Erie Public Bridge Authority v. Davis*, 277 N.Y. 292, 299; *Port of New York Authority v. Township of Weehawken*, 27 N.J. Super. 328; *Sullivan v. Port of New York Authority*, 134 N.J.L. 124; *Miller v. Port of New York Authority*, 18 N.J. Misc. 601, 606)."

The court went on to say:

> "The Port Authority has uniformly been held to be in the position of 'the State' whenever the issue has arisen." *Id.*

In *Voorhis v. Cornell Contracting Corp. & Port of New York Authority*, 170 Misc. 908, 912; 10 N.Y.S.2d 378, 381 (City Ct. N.Y. Co. 1938), the court referred to the Port Authority as the "immediate agent of two sovereigns," and said:

> "Indeed, it is hard to see how there could be a clearer instance of an agency sharing the immunity of its creators."

Similarly, the old New Jersey Supreme Court, in *Miller v. Port of New York Authority*, 18 N.J. Misc. 601, 606; 15 A.2d 262, 266 (Sup. Ct. 1939) said:

> "Since the Authority is undoubtedly a direct state agency, exercising an essential governmental function, and, is therefore, an *alter ego* of the state, it follows that the present action is, in effect, a suit against the state itself which would, as we have seen, be clothed with sovereign immunity, unless a waiver or consent can be found in our State Constitution or in some special enactment."

And the court found no such waiver.

More recently, in *Port Authority of New York and New Jersey v. Bosco*, 193 N.J. Super. 696; 254 A.2d 676 (App. Div. 1984) (*per curiam*), cited by the Third Circuit in *PBA*, 819 F.2d at 418, the Appellate Division of the New Jersey Superior Court held that the Port Authority, as a State agency, shared New Jersey's sovereign exemption from the bar of the running of the statute of limitations. The Court explicitly held:

> "Until 1951 the Port Authority 'as an arm and agency of the states,' enjoyed sovereign immunity from suit. See cases collected at *Port of N.Y. Authority v. Weehawken Tp.*, 27 N.J. Super. 328, 333 (Ch. Div. 1953), *rev'd other grounds*, 14 N.J. 570 (1954). *We see no merit to defendants' contention that because the Legislature abrogated this particular attribute of sovereignty by N.J.S.A. 32:1-157 the status of the Port Authority as a state agency was thereby withdrawn in all other respects.*" 193 N.J. Super. at 700; 254 A.2d at 678 (emphasis supplied).

Nevertheless, in the instant case, the Second Circuit cites, as militating against the Port Authority's State agency status, a single provision in the 1922 bi-State legislation describing the Authority as a "municipal corporate instrumentality of the two states." N.Y. Unconsol. L. §6459 (McKinney 1979); N.J.S.A. 32:1-33 (West 1963) (Pet. App., A54). *Feeney v. Port Authority Trans-Hudson Corporation*, 873 F.2d 628, 631. However, as the above discussion makes plain, "municipal corporate instrumentality" is but one of many terms that have been used to describe the Port Authority. *See, PBA*, 819 F.2d at 414-15.

Indeed, more than a half century ago this Court described the Port Authority as "a state instrumentality created by New York and New Jersey" and termed its work a "function which New York and New Jersey had undertaken to perform." *Graves v. New York, ex rel. O'Keefe*, 306 U.S. 466, 484 (1939).

With all due respect to the reasoning of the Second Circuit, the fact is that no court, when squarely confronted with the question of the status of the Port Authority as a municipal corporation in contrast to that of a State agency, has so characterized the agency. *See, Whalen v. Wagner*, 4 N.Y.2d 575, 584; 152 N.E.2d 54, 57-58 (1958), where the question was whether legislation dealing with the Port Authority required a Home Rule Message:

> "There is no question, we think, that the legislation dealing with the Port Authority did not require a city message. The Port Authority is and of necessity has to be a State agency in view of its dual State character and functions."

Nearly fifty years ago in *Howell, supra*, a federal district court quite convincingly explained:

> "The ordinary significance of the term municipal corporation is a city, town or village which is an incorporation of its inhabitants, governed by elected bodies having local self-government, with power to tax and without the obligation to report its activities directly to the executive branch of government.

The Authority is not an incorporation of its inhabitants, but a Board of Commissioners appointed by officials elected by the states at large. The persons who inhabit The Port District have no direct right of vote with respect to the activities of The Authority."

• • •

"The *legislatures*, in drafting §8 of the Comprehensive Plan did *not use the common and familiar term municipal corporation but the uncommon municipal corporate instrumentality, yet in the same context or framework, they used the word municipality to designate cities, towns and villages, and it seems unlikely, they would ignore the common and known term municipal corporation and select an uncommon term if they wished to establish a municipal corporation, as the Bank contends*. Further therein, pledging the credit of either state is prohibited. This would be totally unnecessary if the complainant's interpretation of municipal corporate instrumentality is accepted,. . . ." 34 F.Supp. 797, 800 (emphasis added).

Thus, in *PBA*, the Third Circuit was able to rely upon the fact that the "long-standing judicial characterization of the Authority [as a state agency] has never been questioned by either state legislature despite the numerous opportunities to overrule these decisions . . .." 819 F.2d at 415 (matter in brackets added).

B. The Port Authority is administered as a State agency.

Again, in sharp contrast to the facts before this Court regarding TRPA in *Lake Country Estates*, *supra*, where this Court was impressed by California's difficulty in controlling the actions of the agency, in the instant case, the Port Authority is clearly administered as a State agency. *See*, *inter alia*, *Mineo v. Port Authority of New York and New Jersey*, 779 F.2d 939, 949 (3d Cir. 1985), *reh'g and reh'g en banc denied*, 783 F.2d 42 (3d Cir. 1986), *cert. denied*, 478 U.S. 1005 (1986). (Held: The Port Authority is the "State" for Tenth Amendment purposes.)

More specifically, while TRPA's governors for the most part were county appointees, the Port Authority's twelve Commissioners are appointed by the State Governors – six by the Governor of New York and six by the Governor of New Jersey – and each must be confirmed by their respective State Senates. The Commissioners are chosen in the manner prescribed, and for terms fixed and determined from time to time, by the Legislature of each State. *See*, N.Y. Unconsol. L. §6405 (McKinney 1979); N.J.S.A. 32:1-5 (West 1963) (Pet. App., A51 - A52).[3] New York Commissioners may be removed upon charges and after a hearing by the Governor of the State (Section 4, Chapter 422, Laws of New York, 1930) and New Jersey Commissioners may be removed upon charges and after a hearing

[3] The first New Jersey Commissioners of the Authority were appointed to their office by the New Jersey Legislature itself (Ch. 152, Laws of N.J., 1921), while the New York Commissioners were named by the Governor of New York, with the advice and consent of the State Senate (Ch. 203, Laws of N.Y., 1921). In 1930, when the States transferred their Holland Tunnel to the Port Authority to operate as their agent, the New York Legislature designated by name three of the six New York Commissioners. (Ch. 422, Laws of N.Y., 1930).

by the State Senate. (Section 4, Chapter 245, Laws of New Jersey, 1930), codified as N.J.S.A. 32:2-5 (West 1963) (A14). Port Authority Commissioners take the oath of office constitutionally mandated for State officers by their respective States.

Furthermore, as recognized by this Court in *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1,4 (1977), the Port Authority possesses no powers that have not been delegated to it by the Legislatures of the Compacting States. N.Y. Unconsol. Laws §6408 (McKinney 1979); N.J.S.A. 32:1-8 (West 1963) (Pet. App., A52). Indeed, in this regard, we note that in *Port of New York Authority v. Weehawken Township*, 14 N.J. 570; 103 A.2d 603 (1954), the New Jersey Supreme Court held that the Port Authority could not construct a third tube to the Lincoln Tunnel for the reason that the required express legislative authorization by the States was lacking. Thus, the New Jersey Supreme Court, per then New Jersey Supreme Court Justice Brennan, specifically held:

> ". . . it is our duty to declare the law to be as the Legislature has written it. It follows that *the Port Authority has no authority to proceed with the construction of the third tunnel until expressly authorized to do so by the two States.*" 14 N.J. at 580; 103 A.2d at 608 (emphasis added).

Moreover, the Port Authority Compact provides for a gubernatorial veto power pursuant to which the Governor of either State retains the right to veto the actions of the Commissioners appointed from that State. N.Y. Unconsol. L. §6417 (McKinney 1979); N.J.S.A. 32:1-17 (West 1963) (A2).[4] The Governor of New Jersey possesses his veto

[4] The same gubernatorial veto power applies equally to the actions of PATH. N.Y. Unconsol. L. §6612 (McKinney 1979); N.J.S.A. 32:1-35.61 (West 1963) (A5).

power pursuant to N.J.S.A. 32:2-6 (West 1963); the Governor of New York, pursuant to N.Y. Unconsol. L. §§7151 *et seq.* (McKinney 1979) (Pet. App., A55).[5]

Some additional examples of State control over Port Authority administration are the Port Authority's obligation to submit an annual report to the Legislatures, N.Y. Unconsol. L. §6408 (McKinney 1979); N.J.S.A. 32:1-8

[5] The power to veto Commissioner actions naturally has led to close cooperation between both Governors and the Authority. In fact, the District of Columbia Circuit, in reversing the contempt of Congress conviction of a Port Authority official, specifically noted that:

> "After being denied the opportunity to appear before the Subcommittee, the Governors wrote identical letters to their respective representatives on the Board of Commissioners of the Authority, instructing them to direct appellant not to comply with the subpoena. The Board of Commissioners so directed appellant on June 27, 1960." *Tobin v. United States*, 306 F.2d 270, 271-72 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 902 (1962).

As summarized by the Court of Appeals, a major issue raised by the Port Authority in this litigation was:

> "2. That 'the subpoena issued by the Subcommittee, demanding documents relating to the internal administration of the Port Authority which the Governors of New York and New Jersey ordered appellant not to produce, [was] an unconstitutional invasion of powers reserved to the States under the Tenth Amendment to the Constitution.' " *Id.* at 272.

It is significant that in making this argument the Port Authority and its official were supported by the Attorneys General of both New York and New Jersey. It is, indeed, difficult to imagine a more vivid example than this controversy between the Port Authority and the States, on one side, and a Subcommittee of Congress, on the other, of the fact that the Port Authority is considered by the two States to be their direct instrumentality performing important governmental functions on their behalf.

(West 1963) (Pet. App., A52); the State Comptroller's authority to examine the Port Authority's books and accounts, N.Y. Unconsol. L. §7071 (McKinney 1979); N.J.S.A. 32:2-31 (West 1963) (A9); and the requirement of concurrence by the Legislatures before Port Authority rules and regulations become effective, N.Y. Unconsol. L. §6419 (McKinney 1979); N.J.S.A. 32:1-19 (West 1963) (A3).

In sum, the Port Authority's Compact and subsequently enacted bi-State authorizing legislation make it quite clear that the Port Authority indeed is "in fact an arm of the State subject to its control . . ." within the meaning of this Court's opinion in *Lake Country Estates*, 440 U.S. at 402.

C. The Port Authority performs State, not local, functions.

TRPA, this Court noted in *Lake Country Estates*, *supra*, was engaged in "land use planning", which it characterized as "traditionally a function performed by local governments." 440 U.S. at 402. The instant case is thus easily distinguishable since the Port Authority, as noted above, is and has always been held to be an agency of the States created to carry out State functions, such as vehicular crossings and a unified air terminal network, which the Compacting States individually cannot efficiently perform because of the complication of competing sovereignties.

That the Port Authority performs State, and not local, governmental functions was the precise holding of the New York Court of Appeals in *Whalen v. Wagner*, *supra*. There the court, in ruling that no home rule message was necessary under the New York Constitution in connection with Port Authority legislation, expressly stated that prior cases

> ". . . establish the Port Authority to be engaged in matters of State concern." 4 N.Y. 2d at 582; 152 N.E. 2d at 57.

And so the State's highest court held.

That *Whalen v. Wagner*'s holding is correct is seen in the Preamble to the Compact of April 30, 1921 where the State Legislatures declared, in relevant part, as follows:

> "Whereas, . . . the commerce of the port of New York has greatly developed and increased and *the territory in and around the port has become commercially one center or district*; and
>
> Whereas, It is confidently believed *that a better coordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the states of New York and New Jersey;*[a] and

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[a] The Second Circuit cited against the Port Authority's State agency status, its observation that Port Authority activities are "localized and focus only on the port of New York." *Feeney* 873 F.2d at 631. The Second Circuit's observation is contrary to the express holding of New York's highest court in *Whalen v. Wagner*, discussed above in the text. In addition we point out that access to Port Authority facilities is not limited to residents of the port district. Moreover, as will be more fully developed in subpoint D, *infra*, ten years after this legislative declaration in the Preamble, in enacting the general reserve fund legislation, specifically, N.Y. Unconsol. L. §7002 (McKinney 1979); N.J.S.A. 32:1-142 (West 1963) (A8), the Legislatures provided that any surplus Port Authority revenues be distributed as directed by the States. There is no restriction in that legislation on the distribution of such excess revenues only within the Port of New York District. Thus, irrespective of any "localized" nature of Port Authority activities, the Authority is a State agency.

In this connection, indicative of the States' intention that the Port Authority be considered a State rather than a local instrumentality is the fact that the States adopted their 1921 Compact which created this agency in the form of an amendment to their 1834 agreement in which they settled a long standing boundary dispute. The 1834 agreement received the consent of Congress, 4 U.S. Stat. 708 (1834).

Whereas, The future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums of money *and the cordial co-operation of the states of New York and New Jersey* in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans; and

Whereas, Such result can best be accomplished through the *co-operation of the two states by and through a joint or common agency;*" N.Y. Unconsol. Laws §6401 (McKinney 1979); N.J.S.A. 32:1-1 (West 1963) (emphasis supplied) (A1).

As the district court observed in *Howell, supra*:

> "The Port Authority, a bi-state corporation (*Helvering, etc. v. Gerhardt*, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed 1427), is a joint or common agency of the states of New York and New Jersey. It *performs governmental functions which project beyond state lines*, . . ." 34 F.Supp. at 801. (emphasis added).

D. The technical insulation of the States' tax and other general revenues from judgments against the Port Authority does not prevent the Port Authority from sharing the States' Eleventh Amendment immunity.

Although it is true that the Port Authority may not draw upon State tax revenues nor pledge the credit of the States, it is equally true that the assets it administers as agent for the two States are held for the benefit of the people of the States. The Legislatures of the Compacting States in authorizing the Port Authority to expend funds in the effectuation of various projects have expressly stated that the

undertaking of such projects is for the benefit of the people of the two States. Thus, in authorizing the Port Authority to operate petitioner, PATH, the Legislatures explicitly stated:

> "The effectuation, of . . . the Hudson tubes and the Hudson tubes extensions, . . . are and will be in all respects for the benefit of the people of the states of New York and New Jersey, for the increase in their commerce and prosperity and for the improvement of their health and living conditions; and the port authority and any subsidiary corporation incorporated for any of the purposes of this act shall be regarded as performing an essential governmental function in undertaking the effectuation thereof, and in carrying out the provisions of law relating thereto." N.Y. Unconsol. L. §6610 (McKinney 1979); 32:1-35.59 (West 1963) (A4).

Similar statements can be found in legislation authorizing the effectuation of other public projects by the Port Authority.

Furthermore, even though the Port Authority cannot legally impose any financial obligation upon the States, bi-State legislation demonstrates not only that the States view the Authority as their agent in effectuating the public projects which they authorize, but the legislation also discloses a close, meaningful relationship between State and Port Authority finances. This close financial relationship, we believe, demonstrates the extremely unrealistic, myopic view of the Second Circuit's definition of what constitutes a "state treasury".

Thus, in its early years, the Port Authority was supported by State appropriations until its revenues became adequate to meet its expenses. N.Y. Unconsol. L. §6416

(McKinney 1979); N.J.S.A. 32:1-16 (West 1963) (Pet. App., A53). And when it appeared that the Authority faced a default on its Series "A" bonds which were issued to finance its two Arthur Kill bridges – the Outerbridge Crossing and the Goethals Bridge – the States transferred their Holland Tunnel (together with its revenue flow) to the Port Authority. The Holland Tunnel was the first vehicular crossing to be constructed between the States. It was build by separate State Commissions, acting jointly, pursuant to a 1919 interstate Compact to which Congress consented, 41 U.S. Stat. 158 (1919).

In the words of Erwin W. Bard in his *The Port of New York Authority* (Columbia University Press, 1942), the Holland Tunnel was transferred in order, *inter alia*,

> "... to safeguard the Port Authority's previous commitments ... The Holland Tunnel ... earned in 1930 a net income ... of $5,034,094. By transferring its income to the Port Authority and anticipating its eventual refinancing, an annual surplus between $1,000,000 and $1,500,000 could be expected. This would be sufficient to save the bridge bonds ..." at p. 238

After noting that the transfer of the Holland Tunnel to the Port Authority was designed "to help place the Port Authority on a self-sustaining basis," the court in *United States Trust Company v. State of New Jersey*, 134 N.J. Super. 124, 141; 338 A.2d 833, 842 (L. Div. 1975), *aff'd*, 69 N.J. 253; 353 A.2d 514 (1976), *rev'd*, 431 U.S. 1 (1977), went on to say that "Simultaneously, the states enacted ... the General Reserve Fund Act." This legislation required that the Authority pool the surplus revenues it derived from the facilities it constructed or acquired through the issuance of its bonds, notes, or other obligations, and establish a general reserve fund. N.Y. Unconsol. L. §7002

(McKinney 1979); N.J.S.A. 32:1-142 (West 1963) (A8). As described in *United States Trust Company, supra:*

> "The act pledges the general reserve fund as security for ... bonds ... issued by the Authority. Surplus moneys of the Authority in excess of the general reserve fund requirements may be used for any purpose authorized by the states." *Id.*

Thus, the two Legislatures not only directed the use and flow of Port Authority revenues, but made it quite clear that any surplus revenues could be utilized as authorized by the two States.

Finally, the budget of this agency, since it is both adopted and administered by a Board of Commissioners appointed by the Governors and subject to gubernatorial veto, is hardly akin to that of any other type of political subdivision in either State. Also unlike political subdivisions, which generally are recipients of State monies, Port Authority funds, as previously noted, are used for projects authorized by the State Legislatures, thus providing the States with alternative means of financing and effectuating important public projects. For example, the Legislatures have recently authorized the Port Authority to purchase buses which it leases *without charge* to public and private transportation entities in both States, N.Y. Unconsol. L. §§7201 *et seq.* (McKinney Supp. 1989); N.J.S.A. 32:2-23.27 *et seq.* (West Supp. 1989)[7] (A11 - A13). Effectuation of the States' multimillion dollar Bus project is only possible if there are sufficient Port Authority funds available. Money being fungible, the unavailability of Port Authority funds as a result, for example, of having to pay

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[7] Significantly, for purposes of the Bus project, the port district was legislatively expanded to a radius of seventy-five miles around the Port Authority Bus Terminal. *See*, N.Y. Unconsol. L. §7202 (10) (McKinney Supp. 1989); N.J.S.A. 32:2-23.28 (10) (West Supp. 1989) (A14)

a money judgment would mean that the two States would have to look to their general treasuries to fund important projects or else deny the public the benefit of such services.[8] In that sense, then, the Port Authority's money is a component of a "state treasury" since Port Authority money is being used for the benefit of the people of the two States for projects which must be authorized by their Legislatures.

POINT II

The Finding That The Port Authority Is Not A State Agency For Eleventh Amendment Purposes Results From A Misinterpretation Of Eleventh Amendment Jurisprudence.

We respectfully submit that the Second Circuit's analysis of the "state treasury" factor is defective in two respects. As already noted, its overemphasis on this single factor misconstrues *Lake Country Estates*, *supra*. *See*, Point I, *supra*. So too, the clear implication in its opinion that the

[8] Additionally, it should be emphasized that the Port Authority, in recent years, working closely with both Governors and pursuant to legislative authorization, is spending many millions of dollars for economic development and infrastructure renewal in the two States.

For example, at the request of the Governor of New Jersey, the Port Authority has authorized expenditures, pursuant to its Marine Terminal legislation, specifically, N.Y. Unconsol. L. §6673 (McKinney Supp. 1989); N.J.S.A. 32:1-35.30 (West Supp. 1989) (A7), to provide improvements to Conrail's northern branch lines for its freight operations in order to permit the New Jersey Department of Transportation to provide a light-rail transit way to improve regional passenger transportation. Similarly, at the request of the Governor of New York, the Port Authority has authorized expenditures, pursuant to its Industrial Development legislation, specifically, N.Y. Unconsol. L. §7172(e) (McKinney 1979); N.J.S.A. 32:1-35.73(e) (West Supp. 1989) (A10), for the construction of the Center for Advanced Technology Telecommunications, which is to be a part of a major redevelopment in downtown Brooklyn known as Metrotech. Both of these expenditures, like the Bus project, do not provide revenues for the Port Authority.

phrase "state treasury" is referable only to state tax or other general state revenues constitutes a fundamental misinterpretation of Eleventh Amendment jurisprudence.

More specifically, the opinion of the Second Circuit purports to analyze the question of Eleventh Amendment immunity under the factors this Court delineated in *Lake Country Estates* and, indeed, it grudgingly acknowledged that the case for Port Authority immunity was stronger than it was for the agency before this Court in *Lake Country Estates*. *Feeney*, 873 F.2d at 631. Nevertheless, the Second Circuit went on to hold "that the Port Authority, and therefore PATH, is not a state agency for Eleventh Amendment purposes", based on one factor, to wit: whether a judgment against PATH would put the "state treasury" at risk of liability (*Id.* at 630).

But, this Court has never held this one factor to be the *sine qua non* for immunity. Indeed, in *Lake Country Estates*, in commenting on this factor as but one of the elements to be weighed, this Court made the simple observation that "some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." 440 U.S. at 400-01 (footnote omitted). But, nowhere in the *Lake Country Estates* opinion is there any indication that this factor is, *by itself*, controlling.[9] Indeed, in *Pennhurst State School and*

[9] Although the Second Circuit had to acknowledge that the "state treasury" factor could not be "exclusively determinative", *Feeney*, 873 F.2d at 631, quite obviously, it gave only lip service to this concept. Thus, it reluctantly would acknowledge but two factors, i.e., method of appointment of commissioners by the states and the gubernatorial veto, as evidencing State agency status (*Id.*). In contrast, the Third

(Footnote continued)

Hospital v. Halderman, 465 U.S. 89, 101 n.11 (1984), this Court held that suits against the sovereign are found not only where the judgment "would expend itself on the public treasury", but also where the public administration would be interfered with or a judgment would either compel or restrain the government in its actions, citing, *Dugan v. Rank*, 372 U.S. 609, 620 (1963). In point of fact, suits seeking injunctive relief against the State are as much barred by the Eleventh Amendment as are suits for money damages. *See, inter alia, Alabama v. Pugh*, 438 U.S. 781, 782 (1978).

Moreover, the Second Circuit's overly restrictive view of what constitutes a "state treasury" is a result of a fundamental misinterpretation of Eleventh Amendment jurisprudence. The purpose of the Eleventh Amendment is not merely to protect "public" funds. If it were, cities and counties, whose funds are just as "public", should be entitled to invoke the immunity. Yet they are not. *See, Lake Country Estates*, 440 U.S. at 401; *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S 274, 280-1 (1977); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).[10] Rather, the Eleventh Amendment, as this Court has counseled time and again, embodies the recognition of state sovereignty as a limitation upon Article III judicial power.

Circuit in *PBA*, *supra*, was able to rely upon a host of additional "significant indicia of state control over the Authority", to wit: the requirement of annual reports to the state legislatures, the requirement of legislative concurrence to changes in Port Authority rules and regulations, the requirement of express legislative authorization for Port Authority projects, as well as other factors establishing that "the Authority is a direct agency of the states . . ." 819 F.2d at 417 – all evidently disregarded by the Second Circuit.

[10] The *Lincoln County* Court did not really articulate a reason for differentiating between the State and political subdivisions for this purpose. Apparently what has developed is a purely historical distinction.

Indeed, in *Ford Motor Company v. Department of Treasury of Indiana*, 323 U.S 459 (1945), cited in *Lake Country Estates*, *supra*, and the case most often cited for the importance of the "state treasury" factor, this Court's focus upon the potential liability of the State treasury was for the purpose of determining who was, in fact, the real party in interest since individuals were nominal defendants, and a point apparently had been raised that the presence of such individuals as named defendants created federal court jurisdiction. This Court's words are clear and admit of no other interpretation:

> "And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." (citations omitted) 323 U.S. at 464.

Similarly, in *Edelman v. Jordan*, 415 U.S. 651, *reh'g denied*, 416 U.S. 1000 (1974), cited by the Second Circuit for this proposition, 873 F.2d at 633, again the focus on the "state treasury" was for the purpose of identifying the real party in interest where State officials were the only named defendants.[11] Furthermore, both *Edelman* and

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[11] The *Feeney* court cites language in *Edelman* to the effect that:

> " '[T]he rule [that] has evolved [is] that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.' 415 U.S. at 663." 873 F.2d at 631.

While that proposition is certainly true, it does not necessarily then follow that if a judgment is not paid from the State's general tax coffers, Eleventh Amendment immunity cannot be found under *Lake Country Estates*, *supra*. Thus, as previously explained, at no time does PATH concede that the Port Authority's treasury, dedicated to State

(Footnote continued)

Ford preceded *Lake Country Estates* with its specific test for Eleventh Amendment immunity.

That the protection of state treasury funds is not this Court's *raison d'etre* for Eleventh Amendment immunity is also well-established by the fact that the Eleventh Amendment is not necessarily a bar to such funds being expended in an award of attorney's fees. *See*, *Kentucky v. Graham*, 473 U.S. 159, 170-71 (1985); *Hutto v. Finney*, 437 U.S. 678, 695 (1978). Nor is the Eleventh Amendment a defense when these funds are expended in obedience to the dictates of an injunction mandating that State officials conform their conduct to federal law. *See*, *Quern v. Jordan*, 440 U.S. 332, 338 (1979); *see also*, *Milliken v. Bradley*, 433 U.S. 267, 289 (1977).

The fact is, as this Court repeatedly has emphasized, that the Eleventh Amendment finds its purpose in the vindication of State sovereign prerogatives. *See*, *Pennhurst*, *supra*, "we must be guided by '[t]he principles of federalism that inform Eleventh Amendment doctrine' ", 465 U.S. at 100, citing *Hutto*, *supra*, 437 U.S. at 691. If that is so, of what possible moment is it in how many or in what particular coffers the State chooses to divide up its assets? PATH respectfully submits that the test developed in *Ford*, *supra*, to determine the real party in interest to a lawsuit should not be turned into a vehicle for federal court interference with the manner in which a State orders its fiscal affairs.

Thus, to the extent that there are cases at the district and circuit court levels that turn upon the "state treasury" factor, such factor nevertheless is inappropriately applied to disqualify an entity like the Port Authority, which, as

governmental purposes, legislatively constrained in its uses, and subject to the gubernatorial veto, is not a State treasury within the meaning of *Lake Country Estates*.

we fully established in Point I, *supra*, and, as found by the Third Circuit, clearly "functions as an agency of the state . . . ." *PBA*, 819 F.2d at 417.

In point of fact, contrary to the Second Circuit's belief, far from stressing the "state treasury" factor, this Court's opinion in *Lake Country Estates*, is more properly read as being directed at, not surprisingly in view of the Eleventh Amendment's deference to State sovereignty, the intention of the States in creating the agency, with the agency's financial structure being just one factor in gleaning that intention. Thus, this Court has made it clear that the appropriate judicial inquiry is whether:

> ". . . there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose. . . ." *Lake Country Estates*, 440 U.S. at 401.

Compare *PBA*, *supra*:

> ". . . although the Authority is no longer directly funded by the states, we conclude that the *history* of its financial structure, and the *statutory constraints* placed on the use of its funds, indicate that *the Authority is considered an arm of the states by New York and New Jersey*." 819 F.2d at 416 (emphasis supplied).[a]

[a] It should be noted that the Second Circuit has misinterpreted the Third Circuit's decision in *PBA* to the extent that it opined that the *PBA* holding was based on what it deemed to be an erroneous finding that two States were statutorily obligated to make appropriations should a judgment against the Port Authority deplete its resources. *Feeney*, 873 F.2d at 632. That particular language in *PBA*, however, is just as consistent with a finding that the States, in carrying out their

(Footnote continued)

In sum, *Lake Country Estates* clearly established that the focus of judicial inquiry in Eleventh Amendment claims should be directed at determining the intent of the Compacting States. In the case of the Port Authority, the requisite "good reason to believe" that the States intended to create an agency cloaked with Eleventh Amendment immunity is self-evident. For irrespective of its current financial self-sufficiency, in forming the Port Authority in 1921, the States of New York and New Jersey, in fact, did create, and Congress consented to the creation of, an agency that was, in the absence of bi-State legislative consent to suit even in the courts of the Compacting States, "totally immune from suit". *PBA*, 819 F.2d at 418; *accord*, *Howell*, 34 F.Supp. at 801; *Trippe*, 14 N.Y.2d at 123; 198 N.E.2d at 586.

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solemn obligations pursuant to the bi-State Compact, would make such an appropriation. In essence, this is what occurred, when, as previously pointed out, the Port Authority faced the prospect of financial ruin due to an impending default on its early bridge bonds. As we have seen, the States then came to its rescue by their transfer of the financially successful Holland Tunnel to the Authority.

So too, the Second Circuit for some reason finds significant the fact that any State appropriation to cover judgments against the Port Authority could not be made "without gubernatorial consent." *Id.* How requiring the consent of the highest elected State official to such an appropriation which, after all, is an ordinary incident of the legislative process, negates State agency status is something of a mystery.

In any event, the *PBA* decision in no way turned upon any such statutory obligation. In fact, the Third Circuit specifically noted that:

> ". . . the Authority's current funding structure does not provide conclusive evidence that the Authority is an agency of the state . . . ." 819 F.2d at 416 (emphasis supplied).

POINT III

The Second Circuit Ignored The Standards Set Forth By This Court In Finding A Waiver of Eleventh Amendment Immunity.

As noted above, irrespective of the Port Authority's present financial self-sufficiency, in creating an entity totally immune from suit, the two States, by definition, intended to create an entity that shared their Eleventh Amendment immunity.

Thus, the question of whether PATH may interpose Eleventh Amendment immunity against a FELA claim comes down to whether in 1951, some thirty years after the States created the Port Authority,[13] they waived its Eleventh Amendment immunity in enacting the Port Authority's suability statute, N.Y. Unconsol. L. §§7101 *et seq.* (McKinney 1979); N.J.S.A. 32:1-157 *et seq.* (West 1963) (Pet. App., A54).

The Second Circuit recognized that this Court's test for a waiver of Eleventh Amendment immunity is a stringent one:

> "We acknowledge that the standard for determining whether a state has waived its Eleventh Amendment immunity is strict. In *Atascadero*

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[13] In *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), Congressional consent to a compact containing a "sue and be sued" provision was found to have effected an abrogation of Eleventh Amendment immunity. 359 U.S. at 281-82. To the extent the rule of *Petty* is still good law, in light of this Court's later Eleventh Amendment decisions, *see*, *Leadbeater v. Port Authority Trans-Hudson Corporation*, 873 F.2d 45, 49-50, *rehg.* and *rehg. en banc denied* (3d Cir. 1989), Congressional abrogation certainly cannot be inferred on the basis of Congressional consent granted thirty years prior to the States' enactment of the Port Authority's suability statute. *Petty* is thus amply distinguishable from the instant case.

> State Hospital v. Scanlon, 473 U.S. 234, 239-40 (1985), *reh'g denied*, 473 U.S. 926 (1985), the Supreme Court stated that 'a State will be deemed to have waived its immunity "only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction' " ' (citation omitted). *See also*, *Edelman v. Jordan*, 415 U.S. at 673." 873 F.2d at 632.

Nevertheless, the Second Circuit somehow concluded that the Legislatures both implicitly and expressly waived the Port Authority's Eleventh Amendment immunity in the suability statute.

What the Second Circuit seems to be saying is that the Eleventh Amendment was implicitly waived by the inclusion of a reference to *Howell*, 34 F.Supp. 797, in the legislative history of the suability statute. *Feeney*, 873 F.2d at 632-33. *Howell*, however, was merely one case included in a long list of decisions, which the Second Circuit had to concede "appears to be exclusively sovereign immunity cases" (*id.* at 633), in which:

> "the courts concluded that in the absence of an express consent by the states to suit against the Port Authority, the Port Authority shared the governmental immunity of the states themselves." 1950 N.Y. Legislative Annual 204 (footnote omitted).

The Second Circuit went on to find that since "*Howell* concluded that the Port Authority was a state agency rather than a political subdivision", *Feeney*, 873 F.2d at 633, the States therefore must have intended to waive the Eleventh Amendment immunity characteristic of a State agency. The Second Circuit's conclusion thus flies directly in the

face of the well-settled principle, recently reiterated by this Court, that "a State does not waive Eleventh Amendment immunity in federal courts merely by waiving sovereign immunity in its own courts." *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 473-74 (1987). (citation omitted)

This Court's recent decision in *Dellmuth v. Muth*, ____ U.S. ____; 109 S.Ct. 2397 (1989) further demonstrates that the Second Circuit's reliance upon the Legislative Annual's reference to the overturning of *Howell* is misplaced. As this Court stated in *Dellmuth*, with respect to Congressional abrogation of Eleventh Amendment immunity, for which unmistakably clear language also is required:

> "In particular, we reject the approach of the Court of Appeals, according to which, '[w]hile the text of the federal legislation must bear evidence of such an intention, the legislative history may still be used as a resource in determining whether Congress' intention to lift the bar has been made sufficiently manifest.' . . . . Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. If Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of *Atascadero* will not be met." 109 S.Ct at 2401 (citation omitted).

Similarly, these stringent standards for finding a waiver of Eleventh Amendment immunity do not support the Second Circuit's holding that the Legislatures' attempt in N.Y. Unconsol. L. §7106 (McKinney 1979); N.J.S.A.

32:1-162 (West 1963)[14] to restrict *venue* to federal district courts lying within the Port District was an "explicit waiver, albeit partial" of Eleventh Amendment immunity. *Feeney*, 873 F.2d at 633.

In *Leadbeater*, *supra*, the Third Circuit answered the very same contention, to wit:

> "The defendant suggests, in opposition, that the provision for venue in certain federal districts is intended to apply to actions over which there is some basis for federal jurisdiction independent of the consent provisions. It is not apparent to us that the venue provision applies in such cases, where consent to suit is not required. ***But whatever the purpose of this part of Section 32:1-162, we think the Supreme Court, by requiring proof of consent by 'overwhelming implication,' mandates that there be much more than inclusion of a reference to a federal judicial district in a venue provision.***" 873 F.2d 45, 49.[15] (emphasis supplied)

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[14] The text reads in relevant part as follows:

> "The foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the port authority shall be laid within a county or a judicial district, established by one of said states or by the United States, and situated wholly or partially within the Port of New York District. The port authority shall be deemed to be a resident of each such county or judicial district . . . ." (Pet. App., A54-A55).

[15] In this regard, it should be remembered that the parameters of Eleventh Amendment immunity were far less well-settled in 1950-1951 than they are now. Indeed, it was not until *Welch*, *supra*, that this Court clearly overruled a precedent of nearly 25 years standing, *Parden v. Terminal Railway of Alabama State Docks Department*, 377 U.S.

(Footnote continued)

The Third Circuit in *Leadbeater* clearly is correct. Whatever may be the efficacy of the Legislatures' attempt in §7106 to control the choice of *venue*,[16] it strains reason to believe that the Legislatures intended to do something as momentous as waive a constitutionally-protected right *sub silentio* by the mere inclusion of a reference to federal judicial districts in a general purpose *venue* provision.[17] Quite obviously, the Legislatures can be presumed to have known how to consent to suit in federal court had that been their purpose. In fact, the language of the Legislative Annual cited above makes it perfectly clear that the question of Eleventh Amendment immunity was not addressed.

In this regard, we note that this Court just recently took occasion to reiterate in *Welch*, *supra*, that:

> " '[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights,' *Edelman v. Jordan*, *supra*, 415 U.S., at 673, 94 S.Ct., at 1360." 483 U.S. 468, 473.

In the instant case, the Second Circuit had to concede that "use of the term 'venue' [in §7106] is somewhat anomalous

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184 (1964), to the effect that Eleventh Amendment immunity could be waived merely by a State participating in a Congressionally-regulated activity. *Welch*, 483 U.S. at 478.

[16] But *see*, *Brophy v. Consolidated Rail Corporation*, Civ. A. No. 85-4201, 1986 W.L. 11686 (E.D. Pa.)

[17] The venue language of §7106 is neither a consent to, nor a waiver of, anything. The waiver of sovereign immunity is contained in §7101. The subsequent provisions of the suability statute for the most part serve to condition and limit the consent. See, generally, *inter alia*, *Trippe*, 14 N.Y.2d 119; 198 N.E.2d 585; *Luciano v. Fanberg Realty Co.*, 102 A.D.2d 94; 475 N.Y.S.2d 854 (1st Dept. 1984). Thus, there is no basis for the Second Circuit's finding that §7106 effected a "partial" waiver of Eleventh Amendment immunity.

in the Eleventh Amendment context", 873 F.2d at 633. As this Court recently explained in *Dellmuth*, *supra*:

> " . . . imperfect confidence will not suffice given the special constitutional concerns in this area." 109 S.Ct. at 2402.

Thus, as the Third Circuit correctly found in *Leadbeater*, *supra*, "somewhat anomalous" statutory language simply cannot satisfy the "express language" or "overwhelming implication" standards for waiver of Eleventh Amendment immunity established by this Court.

CONCLUSION

The Orders of the Court of Appeals Should Be Reversed and The Complaints Dismissed for Lack of Subject Matter Jurisdiction.

Dated: New York, New York
December 14, 1989

Respectfully submitted,

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APPENDIX

N.Y. Unconsol. L. §6401; N.J.S.A. §32:1-1

§6401. Preamble

Whereas, In the year eighteen hundred and thirty-four the states of New York and New Jersey did enter into an agreement fixing and determining the rights and obligations of the two states in and about the waters between the two states, especially in and about the bay of New York and the Hudson River; and

Whereas, Since that time the commerce of the port of New York has greatly developed and increased and the territory in and around the port has become commercially one center or district; and

Whereas, It is confidently believed that a better coordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the states of New York and New Jersey; and

Whereas, The future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums of money and the cordial co-operation of the states of New York and New Jersey in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans; and

Whereas, Such result can best be accomplished through the co-operation of the two states by and through a joint or common agency.

Now, therefore, The said states of New Jersey and New York do supplement and amend the existing agreement of eighteen hundred and thirty-four in the following respects:

COMPACT ARTICLE XVI

N.Y. Unconsol. L. §6417; N.J.S.A. §32:1-17

§6417. Quorum; veto power

Unless and until otherwise determined by the action of the legislatures of the two states, no action of the port authority shall be binding unless taken at a meeting at which at least three of the members from each state are present, and unless a majority of the members from each state present at such meeting but in any event at least three of the members from each state, shall vote in favor thereof. Each state reserves the right to provide by law for the exercise of a veto power by the governor thereof over any action of any commissioner appointed therefrom.

COMPACT ARTICLE XVIII

N.Y. Unconsol. L. §6419; N.J.S.A. §32:1-19

§6419. Rules and regulations

The port authority is hereby authorized to make suitable rules and regulations not inconsistent with the constitution of the United States or of either state, and subject to the exercise of the power of congress, for the improvement of the conduct of navigation and commerce, which, when concurred in or authorized by the legislatures of both states, shall be binding and effective upon all persons and corporations affected thereby.

N.Y. Unconsol. L. §6610; N.J.S.A. §32:1-35.59

§6610. Purpose

The effectuation of the world trade center, the Hudson tubes and the Hudson tubes extensions, or any of such facilities constituting a portion of the port development project, are and will be in all respects for the benefit of the people of the states of New York and New Jersey, for the increase of their commerce and prosperity and for the improvement of their health and living conditions; and the port authority and any subsidiary corporation incorporated for any of the purposes of this act shall be regarded as performing an essential governmental function in undertaking the effectuation thereof, and in carrying out the provisions of law relating thereto.

N.Y. Unconsol. L. §6612; N.J.S.A. §32:1-35.61

§6612. General powers; local laws; subsidiary corporation

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Nothing in this act shall be deemed to prevent the port authority from establishing, acquiring, owning, leasing, constructing, effectuating, developing, maintaining, operating, rehabilitating or improving all or any portion of the port development project through wholly owned subsidiary corporations of the port authority or from transferring to or from any such corporations any moneys, real property or other property for any of the purposes of this act. If the port authority shall determine from time to time to form such a subsidiary corporation it shall do so by executing and filing with the secretary of state of New York and the secretary of state of New Jersey a certificate of incorporation, which may be amended from time to time by similar filing, which shall set forth the name of such subsidiary corporation, its duration, the location of its principal office, and the purposes of the incorporation which shall be one or more of the purposes of establishing, acquiring, owning, leasing, constructing, effectuating, developing, maintaining, operating, rehabilitating or improving all or any portion of the port development project. The directors of such subsidiary corporation shall be the same persons holding the offices of commissioners of the port authority. Such subsidiary corporation shall have all the powers vested in the port authority itself for the purposes of this act except that it shall not have the power to contract indebtedness. Such subsidiary corporation and any of its property, functions and activities shall have all of the privileges, immunities, tax exemptions and other exemptions of the port authority and of the port authority's property, functions and activities. Such subsidiary corporation shall be subject to the restrictions and limitations to which the port authority may be subject, including, but not

limited to the requirement that no action taken at any meeting of the board of directors of such subsidiary corporation shall have force or effect until the governors of the two states shall have an opportunity, in the same manner and within the same time as now or hereafter provided by law for approval or veto of actions taken at any meeting of the port authority itself, to approve or veto such action. Such subsidiary corporation shall be subject to suit in accordance with section nine of this act and chapter three hundred one of the laws of New York of nineteen hundred fifty and chapter two hundred four of the laws of New Jersey of nineteen hundred fifty-one as if such subsidiary corporation were the port authority itself. Such subsidiary corporation shall not be a participating employer under the New York retirement and social security law or any similar law of either state and the employees of any such subsidiary corporation, except those who are also employees of the port authority, shall not be deemed employees of the port authority.

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N.Y. Unconsol. L. §6673; N.J.S.A. 32:1-35.30

§6673 Definitions

The following terms as used herein shall mean:

"Marine terminals" shall mean developments, consisting of one or more piers, wharves, docks, bulkheads, slips, basins, vehicular roadways, railroad connections, side tracks, sidings or other buildings, structures, facilities or improvements, necessary or convenient to the accommodation of steamships or other vessels and their cargoes or passengers and shall also mean waterfront development projects. It shall also include such highway projects in the vicinity of a marine terminal providing improved access to such marine terminal as shall be designated in legislation adopted by the two states. Notwithstanding any contrary provision of law, general, special or local, it shall also mean railroad freight projects related or of benefit to a marine terminal or which are necessary, convenient or desirable in the opinion of the port authority for the protection or promotion of the commerce of the port district, consisting of railroad freight transportation facilities or railroad freight terminal facilities; and any equipment, improvement, structure or facility or any land, and any building, structure, facility or other improvement thereon, or any combination thereof, and all real and personal property in connection therewith or incidental thereto, deemed necessary or desirable in the opinion of the port authority, whether or not now in existence or under construction, for the undertaking of such railroad freight projects.

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N.Y. Unconsol. L. §7002; N.J.S.A. §32:1-142

§7002. Establishment of general reserve fund

In all cases where the port authority has raised or shall hereafter raise moneys for the establishment, acquisition, construction or effectuation of terminal and/or transportation facilities by the issue and sale of bonds legal for investment, as herein defined and limited, the surplus revenues received by or accruing to the port authority from or in connection with the operation of such terminal and/or transportation facilities built in whole or in part by the proceeds of the sale of such bonds shall be pooled and applied by it to the establishment and maintenance of a general reserve fund in an amount equal to one-tenth (1/10) of the par value of all bonds legal for investment, as herein defined and limited, issued by the port authority and currently outstanding. The moneys in the said general reserve fund may be pledged in whole or in part by the port authority as security for or applied by it to the repayment with interest of any moneys which it has raised or may hereafter raise upon any bonds, legal for investment, as herein defined and limited, and made and issued by it for any of its lawful purposes; and the said moneys may be applied by the port authority to the fulfillment of any other undertakings which it has assumed or may or shall hereafter assume to or for the benefit of the holders of any of such bonds.

Any surplus revenues not required for the establishment and maintenance of the aforesaid general reserve fund shall be used for such purposes as may hereafter be directed by the two said states.

N.Y. Unconsol. L. §7071; N.J.S.A. §32:2-31

§7071. Examination of books and accounts

Notwithstanding the provisions of any general or special statutes, the comptroller of the state of New York and the comptroller of the state of New Jersey and their legally authorized representatives are hereby authorized and empowered from time to time to examine the accounts and books of the port of New York authority, including their receipts, disbursements, contracts, leases, sinking fund, investments and such other items referring to their financial standing and receipts and disbursements as such comptroller may deem proper. Such examination may be made by either comptroller at any time or by both comptrollers acting together.

N.Y. Unconsol. L. §7172; N.J.S.A. 32:1-35.73

§7172 Definitions

The following terms as used herein shall have the following meanings:

* * *

e. "Industrial development project or facility" or "port district industrial development project or facility" shall mean any equipment, improvement, structure or facility or any land, and any building, structure, facility or other improvement thereon, or any combination thereof, and all real and personal property, located within the New York portion of the port district or within a municipality in the New Jersey portion of the port district which qualified for state aid under the provisions of P.L., 1971, C.64 as most recently supplemented by P.L., 1978, C.14 or which may hereafter qualify for such aid, including, but not limited to, machinery, equipment and other facilities deemed necessary or desirable in connection therewith, or incidental thereto, whether or not now in existence or under construction, which shall be considered suitable by the port authority for manufacturing, research, non-retail commercial or industrial purposes within an industrial park, or for purposes of warehousing or consumer and supporting services directly related to any of the foregoing or to any other port authority project or facility; and which may also include or be an industrial pollution control facility or a resource recovery facility, provided that no such industrial development project or facility may include or be a facility used for the storage

of chemicals, fuel or liquified natural gas unless incidental to the effectuation of such industrial development project or facility;

* * *

N.Y. Unconsol. L. §7201; N.J.S.A. §32:2-23.27

§7201. Legislative findings and determinations

The states of New York and New Jersey hereby find and determine that:

(1) the efficient, economical and convenient mass transportation of persons to, from and within the port of New York district as defined in the compact between the two states dated April thirtieth, nineteen hundred twenty-one (hereinafter called the "port district") is vital and essential to the preservation and economic well being of the northern New Jersey-New York metropolitan area;

(2) in order to deter the economic deterioration of the northern New Jersey-New York metropolitan area adequate facilities for the mass transportation of persons must be provided and buses are and will remain of extreme importance in such transportation;

(3) the provision of mass transportation including bus transportation in urban areas has become financially burdensome and may result in the additional curtailment of significant portions of this essential public service;

(4) the economic viability of the existing facilities operated by the port authority of New York and New Jersey (hereinafter called the "port authority") is dependent upon the effective and efficient functioning of the transportation network

of the northern New Jersey-New York metropolitan area and access to and proper utilization of such port authority facilities would be adversely affected if users of bus transportation were to find such transportation unavailable or significantly curtailed;

(5) buses serving regional bus routes and feeder bus routes and ancillary bus facilities constitute an essential part of the mass commuter facilities of the port district;

(6) the continued availability of bus transportation requires substantial replacement of and additions to the number of buses presently in use in the northern New Jersey-New York metropolitan area;

(7) the port authority which was created by agreement of the two states as their joint agent for the development of transportation and terminal facilities and other facilities of commerce of the port district and for the promotion and protection of the commerce of their port, is a proper agency to provide such buses to each of the two states and such provision of buses by the port authority is in the interest of the continued viability of the facilities of the port authority, and is in the public interest;

(8) the operation of the facilities of the port authority, including but not limited to the port authority bus terminal at forty-first street and eighth avenue in New York county in the city and state of New York and the extension thereto currently under construction (hereinafter called the "bus terminal"), the George Washington bridge

bus station and the provision of buses and ancillary bus facilities pursuant to this act involve the exercise of public and essential governmental functions which must be performed by the two states or any municipality, public authority, agency, or commission of either or both states;

(9) the revision to the port authority bridge and tunnel toll schedules which was effective May fifth, nineteen hundred seventy-five, is expected to result in additional revenues to the port authority sufficient to support the financing with consolidated bonds of the port authority of approximately four hundred million dollars for passenger mass transportation capital projects (hereinafter called "passenger facilities"), approximately one hundred sixty million dollars thereof being allocated to the extension to the bus terminal, with the remaining two hundred forty million dollars to be allocated on the basis of one hundred twenty million dollars in each state for passenger facilities, including but not limited to the acquisition, development and financing of buses and related facilities, as determined by each such state and the port authority acting pursuant to legislative authorization and commitments to the holders of port authority obligations; and

(10) the port authority's function as a regional agency of the two states makes it appropriate that line-haul regional bus route passenger facilities be equipped pursuant to this act with buses and ancillary bus facilities and that the need for development and equipment of such routes be satisfied on a priority basis.

of chemicals, fuel or liquified natural gas unless incidental to the effectuation of such industrial development project or facility;

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N.Y. Unconsol. L. §7202; N.J.S.A. 32:2-23.28

§7202 Definitions

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(10) "regional bus area" shall mean that area in the states of New York and New Jersey which lies within a radius of seventy-five miles of the bus terminal.

N.J.S.A. 32:2-5

32:2-5 Removal

Any commissioners of the port authority from this state may be removed upon charges and after a hearing by the senate.

Chapter 422, Laws of New York, 1930

§4. Removal

Any commissioners of The Port of New York Authority from the state of New York may be removed upon charges and after a hearing by the governor.